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IN THE

Supreme Court of the United States

October Term, 1967

No. 1022

COLONIAL STEEL AND IRON COMPANY, INC., TROITINO AND BROWN, INC. and TRAVELERS INDEMNITY COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA FOR MILLER EQUIPMENT COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The District Court held that Miller was responsible for delay in delivering steel girders to the bridge site. The Circuit Court disagreed and found on facts it described as "scarcely disputable" that this delay was Colonial's fault. Thus, the principal question presented is one of interpretation of largely undisputed facts:

(1) Who was responsible for delay in delivery of steel girders, Miller or Colonial?

If the fault was Colonial's, then a collateral question is presented:

> (2) Was Colonial a "subcontractor" as that term is used in the Miller Act so that the prime contractor, Troitino, and its bonding company, Travelers, are liable as well as Colonial?

The Petitioners describe as "questions presented" other matters which are not proper subjects for review.

They challenge the District Court's jurisdiction, alleging that the complaint inadequately specified the grounds of jurisdiction and that Miller failed to give the ninety day notice required by the Miller Act.

The District Judge found that the action was properly brought under the Miller Act (Pet. App., p. 1, Finding No. 1); no error was assigned on this account in the Circuit Court; no such assignment should be considered here.

Likewise, the District Judge found on undisputed testimony that the last structural steel was delivered to the job site less than ninety days prior to the notice Miller gave of its claim for $18,914.46 (Pet. App. p. 8, Finding No. 15). This was not contested in the Circuit Court and should not be considered here. Petitioner's argument that the notice was not given within ninety days after November 25, 1963 when, according to the Circuit Court, Colonial breached its contract with Miller, or after February 27, 1964, the date from which interest was allowed, ignores the statutory provision that the period for giving notice is measured from the date the last work is performed or material delivered. 40 U.S.C. § 270b(a).

STATEMENT OF THE CASE

Reference should be made to the opinion of the Circuit Court for a fuller statement of facts than is set forth in the

petition (Pet. App., pp. 28-31). It is apparent that this is a contract case and that the petitioners do not really dispute the facts on which the court below based its decision but only that court's interpretation of those facts. As stated in the petition:

> "The Circuit Court of Appeals in this case is substituting its *interpretation* of the facts for that of the District Judge . . ." (Pet., p. XII) (emphasis supplied)

ARGUMENT

A.

This Case Does Not Warrant The Granting Of A Writ Of Certiorari

This case involves no great principle of law which calls for resolution by this Court. The fundamental issue is a pedestrian contract question peculiar to the particular facts involved—who was responsible for delay in delivering the steel girders, Miller or Colonial? Since petitioners take no issue with the holding of both the District and Circuit Courts that pendant jurisdiction existed even if the Miller Act did not apply, this contract dispute is the only issue for Colonial, the principal sponsor of this petition. As to this contract issue, there is no conflict with decisions of this Court, no conflict of circuits, no conflict with state law, no undecided or important question of federal law which should be decided by this Court, nor is there any departure from the accepted and usual course of judicial proceedings. Petitioners have made no such claims concerning this issue. At most, the contention of the petitioners concerning contract interpretation represents only dissatisfaction with an adverse decision. No reason is given why this Court should interfere with the interpretation adopted by the Circuit Court and sustained after application for rehearing.

Nor does the Miller Act question present issues deserving consideration by this Court. The only issue is whether Colonial was a "subcontractor." A substantial body of law has developed about this question and it amply supports the view of the court below that Colonial was a subcontractor. See *e.g., MacEvoy* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102 (1944); *United States ex rel. Wellman Engineering Co.* v. *M.S.I. Corporation*, 350 F.2d 285 (2nd Cir. 1965); *Basich Bros. Construction Co* v. *United States ex rel. Turner*, 159 F.2d 182 (9th Cir. 1946); *United States ex rel. Hardwood Products Corp.* v. *John A. Johnson & Sons, Inc.*, 137 F. Supp. 562 (W.D. Pa. 1955); *Travelers Indem. Co.* v. *United States ex rel. Western Steel Co.*, 362 F.2d 896 (9th Cir. 1966).

Petitioners suggest a possible conflict of circuits, citing *Aetna Casualty Co.* v. *United States ex rel. Gibson Steel Co., Inc.*, 382 F.2d 615 (5th Cir. 1967). No such conflict exists. *Aetna* was properly restricted, as is the present case, to the particular facts involved, and the court's decision, based on those facts, is entirely consistent with the opinion of the court below. The conflict in result—in *Aetna* the fifth circuit held the middle party was not a subcontractor, in the present case the court below held Colonial was a subcontractor—is due entirely to factual differences. The middle party in *Aetna* supplied a wide variety of relatively simple items in contrast to Colonial's agreement to supply complex and integrated fabrication of bridge steelwork. Colonial's work accounted for $115,000 or more than 15% of the prime contract (Pet. App., p. 36), while the middle party in *Aetna* was responsible for roughly 2% of the total job.

Indeed, one may find support for the decision of the court below in the *Aetna* opinion, which states:

> "As we read *MacEvoy,* in a borderline case the distinction between a 'subcontractor' and a 'materialman' turns on the substantiality and importance of the relationship between the middle party and the prime contractor. If a middle party has taken responsibility for a large and definable part of the construction project, he is a 'subcontractor' otherwise he is a 'materialman.'" 382 F.2d 617*

The petition also suggests that there is uncertainty in the law under the Miller Act as applied in this case. This is true only in the sense that the law must be applied to a myriad of factual situations, no two of which are exactly alike. There is little prospect that the present case will provide an opportunity to clear up this kind of uncertainty.

B.

Colonial Was A Subcontractor And The Case Was Properly Brought Under The Miller Act

The court below correctly viewed this as a Miller Act case because Colonial was a subcontractor within the meaning of the Act. Convincing support for this is found in the authorities, including this court's holding in the *MacEvoy* case, *supra,* at p. 4. The relationship between Colonial and Troitino was sufficiently specific and important and involved sufficient responsibility for Colonial to be considered a subcontractor.

The patent artificiality of the "tests" applied in *Potomac Rigging Co.* v. *Wright Contracting Co.,* 194 F. Supp. 444

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* In addition, Judge Wisdom pointed specifically to several factors which indicated that the middle party in the *Aetna* case was a subcontractor and which also indicate that Colonial was a subcontractor. In *Aetna,* the middle party, Rogers (1) had to submit shop drawings for approval by the Contracting Office, (2) maintained no inventory, and (3) was "backcharged" for the cost of correcting unacceptable work. 382 F. 2d 618.

(D.C. Md. 1961), the only pertinent case cited in the Petition beside *MacEvoy* and *Aetna* is recognized in other better considered decisions under the Miller Act. While detailed consideration of the merits of the Miller Act question and the authorities dealing with it is premature at this point, it will be useful to recall the instructive guideline set out by this Court in *MacEvoy*:

> "The Miller Act, . . . is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects." 322 U.S. 107.

It is submitted that Colonial was a subcontractor and not merely a material supplier and that the court below was plainly right in so holding.

C.

Colonial Breached Its Contract With Miller and Miller Was Entitled to Recover the Contract Price From Colonial

As the District Court stated ". . . delivery of the fifteen girders to the job site is the thorn of contention between the parties in this case" (Pet. App. 19). There is no contention that the steel was not properly fabricated and, as the trial court also found, Miller had the girders ready for shipment in November 1963, only about three months after the Colonial-Miller agreement was made and almost as soon as they were needed for erection at the job site (Pet. App. 5). The precise issue, then, is who was responsible for the delay in ultimately delivering the steel to the job site. Miller's obligation, as petitioners concede, was to fabricate the girders and ship them by rail from Miller's plant at Salisbury, North Carolina to Fremont, Virginia, the nearest rail siding to the bridge site. No delivery date was fixed (Pet. p. VI and Pet. App. V, pp. 5, 29). On November 19,

1963, the fifteen steel girders were complete and ready for shipment and some were loaded on the railroad cars at Salisbury, but on November 25, 1963, *Colonial directed Miller to unload them.* This direction was given, the District Judge found, "because Colonial was unable to find anyone to unload them at the rail siding for a reasonable price" (Pet. App. pp. 5-6). As the court below pointed out, the uncontradicted testimony showed that Colonial rejected as too high two prices for unloading which were lower than the ultimate cost of getting the steelwork delivered from the railhead to the bridge.

Based on these facts, which are not questioned in the Petition, the Circuit Court reached the following conclusion upon which the reversal was based:

> "In our view, a total breach of the contract between Colonial and Miller occurred when Colonial, on or about November 25, 1963, directed Miller to remove the girders from the railroad cars. Para. 6 supra. No acceptable excuse or mitigating explanation is offered. Indeed, Colonial admitted in oral argument here that had Colonial then fulfilled its contractual obligation to receive the girders at the rail head there would now be no dispute." (Pet. App., p. 31)

The trial court plainly erred in failing to recognize this as a breach by Colonial and the Circuit Court was correct in so holding. It also correctly absolved Miller, again on the basis of undisputed facts, of blame in connection with later efforts to get the steel from the railroad to the bridge site through heavy mountain terrain in the winter.

A full review of the facts in this case would inappropriately prolong this brief. Those facts mentioned clearly support the conclusion of the Circuit Court that Colonial was responsible for breach of contract and Miller was not at fault.

D.

The Court Below Correctly Assessed Damages

Petitioners review here a claim made in the Circuit Court but not mentioned in the findings of the District Court—that they are entitled to an offset of $2,739.46 against Miller in connection with a contract relating to steel for another bridge not involved in this lawsuit.

Miller's claim and the offsets charged by the District Court may be stated as follows:

1. Amount due Miller under contracts		
(a) Contract of August 23, 1963	$106,000	
(b) Contract of January 9, 1964	3,250	
		$109,250.00
2. Less payments to Miller		90,335.54
3. Balance due and sued for		$ 18,914.46
4. Set-offs aproved by the District Court but disallowed by Circuit Court		
(a) Cost of delivery of girders by Metler	$12,000	
(b) Liquidated damages under prime contract	3,700	
(c) Amount of contract of January 9, 1964 (also included in 1(b) above)	3,250	
5. Total Set-offs		$ 18,950.00

The petitioners claim that item 2, the amount received by Miller, should be increased by $2,739.46, the amount of a set-off allegedly due on another job.

The short answer to this is that petitioners filed no counterclaim on this account. Petitioner's assertion contradicts the finding of the District Court that Miller received payment of only $90,335.54 of its claim (Pet. App. p. 8, Finding No. 17). No appeal was taken from that finding. The Circuit Court properly rejected this claim. This Court should do likewise.

Whether Miller owes Colonial money on another bridge job has never been litigated and certainly may not be litigated for the first time in this Court. Presumably Colonial is still free to sue Miller on this claim if so inclined.

It is inappropriate at this point to discuss other aspects of the computation and assessment of damages except to call attention to the decision of the Circuit Court concerning manifest errors in the computation made by the District Court (Pet. App. pp. 32, 33).

CONCLUSION

Certiorari should not be granted. None of the reasons provided for under Rule 19 of this Court have been presented. Ample consideration was given to the case by the court below, including review of petitions for rehearing. The decision of the Circuit Court below was correct; the decision of the District Court was not.

Respectfully submitted,

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